

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SUSAN PEARCE,)	CASE NO. C06-1091-JCC
)	
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	RE: SOCIAL SECURITY
MICHAEL J. ASTRUE, Commissioner)	DISABILITY APPEAL
of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff Susan Pearce proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Disability Insurance (DI) benefits after a hearing before an Administrative Law Judge (ALJ).

Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, it is recommended that this matter be REMANDED for further administrative proceedings.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1960.¹ She completed high school and vocational training to obtain a real estate license. Plaintiff previously worked as a cosmetics salesperson, cosmetic sales representative, merchandiser, and realtor.

With a filing month of May 2003, plaintiff filed an application for DI benefits, alleging disability since November 2, 2001. (AR 65-67.) Because her insured status for DI expired as of December 31, 2003, she is required to show disability as of that date last insured (DLI). *See* 20 C.F.R. §§ 404.131, 404.321. Her application was denied at the initial level and on reconsideration, and she timely requested a hearing.

On August 3, 2005, ALJ Arthur Joyner held a hearing, taking testimony from plaintiff, medical expert James Haynes, M.D., and vocational expert (VE) Susan Bachelder Stewart, Ph.D. (AR 290-348.) On December 29, 2005, ALJ Joyner issued a decision finding plaintiff not disabled. (AR 16-27.)

Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on July 11, 2006, making the ALJ's decision the final decision of the Commissioner. (AR 5-8.) Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

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¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since her alleged onset date. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's multiple sclerosis (MS) severe. Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairment did not meet or equal the criteria for any listed impairment. If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ assessed plaintiff's RFC and found her unable to perform her past relevant work. If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. The ALJ found plaintiff capable of performing other jobs, including work as a sales associate, call out operator, and night guard.

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's

01 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
02 2002).

03 Plaintiff argues that the ALJ erred in finding her capable of working at step five, noting
04 she could not perform the 8,000 semi-skilled jobs out of the 8,050 total jobs identified by the VE
05 and asserting that the remaining fifty jobs identified is not a significant number. She also asserts
06 error in the ALJ's RFC assessment and the VE's testimony with respect to a "sit/stand" restriction.
07 Plaintiff further argues that the ALJ erred in rejecting the opinions of her treating neurologist Dr.
08 Nancy Lellelid and in finding her and several lay witnesses not credible. Plaintiff requests remand
09 for an award of benefits or, alternatively, for further administrative proceedings.

10 Defendant concedes error, but argues that this case should be remanded for further
11 administrative proceedings. Defendant asserts the need for a more detailed rationale for the ALJ's
12 RFC finding, stating that, as all of the medical evidence presented to the ALJ is beyond plaintiff's
13 DLI, it is unclear how the ALJ established plaintiff's RFC. This allegedly deficient RFC also
14 implicates the ALJ's step five decision. Defendant concedes the step five error asserted by
15 plaintiff, agreeing plaintiff could not perform any of the semi-skilled work and that the remaining
16 fifty jobs is not significant. However, defendant argues that, because it is not clear plaintiff would
17 be unable to perform all unskilled jobs, an award of benefits would be premature. The
18 Commissioner does not address any of defendant's other arguments, stating instead that, on
19 remand, the ALJ should: fully address and explain the weight assigned to the medical evidence,
20 especially for the time period on or before December 31, 2003; reassess plaintiff's maximum RFC,
21 providing examples from the record in support of the RFC determination; and, if necessary, obtain
22 supplemental vocational expert evidence.

01 In reply, plaintiff rejects as false the Commissioner's contention that the record contains
02 no medical evidence prior to December 31, 2003 and provides citation to the relevant portion of
03 the record. (*See* AR at 126-34.) She further describes the ALJ's reference to whether or not she
04 could perform "all" unskilled jobs as improper, noting that the step five test is whether she can
05 perform jobs existing in significant numbers.

06 The Court has discretion to remand for further proceedings or to award benefits. *See*
07 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of benefits
08 where "the record has been fully developed and further administrative proceedings would serve
09 no useful purpose." *McCartey v. Massanari* 298 F.3d 1072, 1076 (9th Cir. 2002).

10 Such a circumstance arises when: (1) the ALJ has failed to provide legally sufficient
11 reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that
12 must be resolved before a determination of disability can be made; and (3) it is clear
from the record that the ALJ would be required to find the claimant disabled if he
considered the claimant's evidence.

13 *Id.* at 1076-77.

14 It is undisputed that the ALJ failed to identify a significant number of jobs plaintiff could
15 perform at step five. However, either because the parties disagree, or because defendant failed
16 to address the issue, there remain a number of issues to resolve in determining whether this case
17 should be remanded for an award of benefits or for further administrative proceedings. Because
18 the ALJ blended his analysis and findings with respect to those issues in his decision, the relevant
19 portion of the ALJ's decision is excerpted here:

20 The claimant's statements concerning her impairment and its impact on her ability to
21 work are not entirely credible. First of all there is little medical evidence in the record
22 as most of the medical evidence was obtained after the hearing. However, the record
confirms that the claimant was diagnosed with relapsing/remitting multiple sclerosis
in 1999. While the claimant's diagnosis clearly precedes her date last insured of

01 December 31, 2003, there is little evidence of treatment prior to this period and no
02 record of exacerbations of disabling severity. Objectively, her MRI in August 2004
03 had not changed since her diagnoses in 1999. She has had very little active treatment
04 since being diagnosed, being maintained on medications without evidence of difficulty
05 or progression of symptoms. Although she complains that she is disabled due to pain
06 and fatigue, the record does not support this. In July 2004 her treating physician
07 opined that she had worsened but this was not confirmed on the MRIs, nor is any
08 worsening of signs, symptoms or functioning documented during the period prior to
09 the claimant's DLI. Her examination on July 15, 2004 noted some impairment but it
10 appeared to be mild to moderate at worst. On September 3, 2004 her exam likewise
11 showed mild impairment. Her treating physician opined on July 25, 2005, that the
12 claimant was disabled due to fatigue, weakness, and balance, but other than her
13 complaints there is no objective support for the degree of severity the claimant
14 asserts. Moreover, this opinion was rendered over eighteen months after the
15 claimant's DLI. Thus, I give little weight to the treating source's opinions as it is not
16 supported by the objective evidence as a whole. Even in the period after her DLI, she
17 is mostly noted to ambulate normally, if somewhat slowly. Her reflexes are mildly
18 impaired and her neurological exams do not show any major deterioration of function.
19 There are no records of exacerbations – let alone frequent ones, and no record of a
20 slow progressive deterioration of function.

11 Additionally, I also note that the claimant's record of earnings evidences that she has
12 not worked much since 1996 which is well before she started having symptoms. The
13 consultative examiners and the medical expert basically agree that there is only mild
14 impairment. I do not credit the claimant's assertion of disabling fatigue, weakness and
15 balance as she has received little treatment in the 5+ years since her diagnosis and there
16 has been only minimal medical attention to her impairments, far less than would be
17 expected if she were impaired as she says. Her medical records show she takes 6
18 over-the-counter medications, 1 for nausea, 2 for multiple sclerosis and 1 for pain.
19 I note that the claimant is not taking any narcotic based pain relieving medication in
20 spite of the allegations of quite limiting pain.

17 I have reviewed the claimant's husband's statements at exhibits 6E and 10E as well
18 as the claimant's friend at exhibit 5E and do not find them persuasive. The husband
19 noted the claimant tried to work but could not. But as stated previously, the
20 claimant's work history reflects little work even prior to her reports of symptoms. He
21 indicated that her attempts were at jobs that required a lot of exertion such as standing
(Costco and Nordstrom) or walking/driving (real estate). Although I find none of
22 these jobs may be appropriate, she could do a modified light position. The claimant's
friend reported significant limitations and needing assistance from others.

I am unable to credit the lay witness's statements in this matter as probative in terms
of the ultimate issue of disability in light of the medical and other factors of this case.

01 See, Smolen v. Chater, 80 F.3d 1273, 1274 (9th Cir. 1996) (concluding that ALJ may
02 consider observations of treating and examining physicians in making credibility
03 determination). One reason for which an ALJ may discount lay statements is that it
04 conflicts with medical evidence. Lewis v. Apfel, 236[] F.3d 503, 514 (9th Cir. 2001).
Material inconsistencies between claimant's testimony and other evidence in the
record are "germane" to discounting lay testimony. Regennitter v. Comm'r of the
Soc. Sec. Admin., 166 F.3d 1294, 1298 (9th Cir. 1999).

05 I conclude the lay witness's statements in this case cannot outweigh my analysis of the
06 objective clinical and laboratory evidence, and medical opinion of record, and of
07 claimant's own credibility. Johnson v. Chater, 87 F.3d 1015, 1018 (8[th] Cir. 1996).
In other words, as the trier of fact in this matter, I find that the subjective elements of
08 proof offered in this case, even with lay corroboration of activities and behavior,
cannot carry claimant's burden of proof of disability. See, Taylor v. Heckler, supra;
09 Vincent on behalf of Vincent v. Heckler, supra. Compare Monguer v. Heckler, 722
F.2d 1033, 1037 (2[d] Cir. 1983) (subjective evidence may be accorded less weight
10 than objective medical evidence); Strauss v. Apfel, 45 F.Supp. [2d] 1043, 1049 (D.
[Or.] 1999) (conflict of mother's testimony with medical testimony and evidence
germane reason to find it not credible).

11 I also note and have considered the claimant's obesity, she is 5 feet, 7 inches tall and
12 weighs 250 pounds. However, there is no record of loss of function, nor increase in
13 symptoms related to her weight in the record. No medical provider has opined that
she was functionally impaired or disabled because of her weight prior to her date last
insured. Nor did the claimant assert her weight as an impairment, either at the time
of hearing, or in the record prior to DLI.

14 Accordingly, I find that the claimant retains the residual functional capacity to lift and
15 carry 20 pounds occasionally and 10 pounds frequently; stand and/or walk for four
16 hours in an 8-hour day and sit for six hours in an 8-hour day with a sit/stand option.
She could not climb ladders but could occasionally climb stairs, balance, stoop, kneel,
17 crouch and crawl. She should avoid heights, hazards, and walking on uneven ground
as well as avoid temperature extremes. She is able to perform detailed tasked [sic]
but not complex tasks.

18 This conclusion is supported by the consultative examiners's opinion, Dr. Bushnell.
19 Although I find that the claimant did not have a severe mental impairment I have
taken into consideration the effect that her diagnosed multiple sclerosis, the
20 consultative examiner's comment on avoiding stress and her medications may have
on her cognition, as well as her alleged symptoms and conclude that she should avoid
21 performing complex tasks which is part of the residual functional capacity as outlined
above.
22

(AR 21-23 (internal citations to record omitted.))

Physicians' Opinions

In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted by another physician, a treating or examining physician's opinion may be rejected only for "clear and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not be rejected without "specific and legitimate reasons" supported by substantial evidence in the record for so doing." *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). Where the opinion of the treating physician is contradicted, and the non-treating physician's opinion is based on independent clinical findings that differ from those of the treating physician, the opinion of the non-treating physician may itself constitute substantial evidence. *See Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995). It is the sole province of the ALJ to resolve this conflict. *Id.*

"Where the Commissioner fails to provide adequate reasons for rejecting the opinion of a treating or examining physician, [the Court credits] that opinion as 'a matter of law.'" *Lester*, 81 F.3d at 830-34 (finding that, if doctors' opinions and plaintiff's testimony were credited as true, plaintiff's condition met a listing) (quoting *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir. 1989)). Crediting an opinion as a matter of law is appropriate when, taking that opinion as true, the evidence supports a finding of disability. *See, e.g., Schneider v. Commissioner of Social Sec. Admin.*, 223 F.3d 968, 976 (9th Cir. 2000) ("When the lay evidence that the ALJ rejected is given the effect required by the federal regulations, it becomes clear that the severity of [plaintiff's]

01 functional limitations is sufficient to meet or equal [a listing.]”); *Smolen v. Chater*, 80 F.3d 1273,
02 1292 (9th Cir. 1996) (ALJ’s reasoning for rejecting subjective symptom testimony, physicians’
03 opinions, and lay testimony legally insufficient; finding record fully developed and disability finding
04 clearly required).

05 However, courts retain flexibility in applying this “‘crediting as true’ theory.” *Connett v.*
06 *Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding for further determinations where there
07 were insufficient findings as to whether plaintiff’s testimony should be credited as true). As stated
08 by one district court: “In some cases, automatic reversal would bestow a benefits windfall upon
09 an undeserving, able claimant.” *Barbato v. Commissioner of Soc. Sec. Admin.*, 923 F. Supp.
10 1273, 1278 (C.D. Cal. 1996) (remanding for further proceedings where the ALJ made a good faith
11 error, in that some of his stated reasons for rejecting a physician’s opinion were legally
12 insufficient).

13 Plaintiff avers that the ALJ failed to give clear and convincing reasons for rejecting the
14 opinions of treating physician Dr. Lellelid and that Dr. Lellelid’s opinions should be credited as
15 true. She notes that Dr. Lellelid first examined her in 1999 (AR 126), reviewed her condition in
16 2000 (AR 126), and thereafter saw her on a number of occasions in 2004 and 2005 (AR 167-70,
17 221, 233-40). In 2005 and 2006, Dr. Lellelid opined that plaintiff could not work on a full time
18 basis. (AR 221, 226-30, 277-81.) In declarations provided in those years, Dr. Lellelid attested
19 to, *inter alia*, plaintiff’s fatigue, difficulty concentrating, and the affect of her obesity in
20 combination with her MS. (AR 226-30, 277-81.) Dr. Lellelid also opined retrospectively that
21 plaintiff, “on a more probable than not basis,” would not have been able to perform full time work
22 since November 2001. (AR 280-81.)

01 As reflected above, the ALJ gave little weight to Dr. Lellelid's opinions upon finding them
02 not supported by the objective evidence as a whole. (AR 22.) He found "no objective support
03 for the degree of severity" asserted by plaintiff and noted that Dr. Lellelid rendered her 2005
04 opinion as to plaintiff's disability over eighteen months after the claimant's December 31, 2003
05 DLI.

06 Plaintiff argues that the ALJ's rejection of Dr. Lellelid's opinions *ipso facto* on the ground
07 that they postdated her DLI is contrary to law. As stated by the Ninth Circuit: "We think it is
08 clear that reports containing observations made after the period for disability are relevant to assess
09 the claimant's disability. It is obvious that medical reports are inevitably rendered retrospectively
10 and should not be disregarded solely on that basis." *Smith v. Bowen*, 849 F.2d 1222, 1225 (9th
11 Cir. 1988) (internal citations omitted). *See also* Social Security Ruling (SSR) 83-20 ("In some
12 cases, it may be possible, based on the medical evidence to reasonably infer that the onset of a
13 disabling impairment(s) occurred some time prior to the date of the first recorded medical
14 examination, e.g., the date the claimant stopped working.") Plaintiff also describes this reasoning
15 as factually flawed, noting that, because the ALJ opined that her condition did not significantly
16 deteriorate from December 31, 2003 to August 2005 (*see* AR 21-22), he cannot reasonably
17 maintain that the later opinions did not accurately reflect her condition as of her DLI.

18 Plaintiff further argues that the ALJ unreasonably rejected Dr. Lellelid's opinions as
19 unsupported by objective evidence. Plaintiff points to Dr. Lellelid's declarations, wherein she
20 stated "there is no objective way of testing fatigue levels[,] . . . [that] the majority of MS patients
21 have fatigue out of proportion to their findings, but that fatigue is real and it limits their daily
22 activities[,]” and that “the idea that any physician is able to predict precisely how much fatigue an

01 individual with MS should have, based on certain objective manifestations of MS, is contrary to
02 [her] experience treating MS patients and is unsupported in the medical literature.” (AR 227,
03 279.)

04 Plaintiff also asserts that the ALJ failed to afford sufficient weight both to Dr. Lellelid’s
05 expertise and the fact that she accounted for both the combined and interactive effect of plaintiff’s
06 impairments. *See Smolen*, 80 F.3d at 1285 (the opinions of specialists related to their areas of
07 specialization are given more weight than the opinions of non-specialists) and *Lester*, 81 F.3d at
08 833 (treating physician’s opinion as to the combined impact of a claimant’s limitations is entitled
09 to special weight). She contends the ALJ erred in favoring the testimony of non-examining
10 medical expert Dr. Haynes. Plaintiff points to Dr. Haynes’ testimony that he was not “in a position
11 to disagree with” Dr. Lellelid’s opinion that plaintiff could not work full time, stating that his point
12 was instead that it was “a subjective problem.” (AR 197.) She also notes Dr. Haynes’ failure to
13 testify specifically as to her precise functional limitations. (AR 295-98.)

14 The Court concludes that, although the ALJ should further examine Dr. Lellelid’s opinions
15 on remand, this physician’s opinions should not be credited as true. The ALJ did not reject Dr.
16 Lellelid’s opinions based solely on their retrospective nature. Further, the ALJ reasonably pointed
17 to this fact as one of the reasons for according Dr. Lellelid’s opinions little weight. There is very
18 little in the record prior to plaintiff’s DLI. As pointed to by plaintiff, there is a brief May 1, 2000
19 letter from Dr. Lellelid in which she states she saw plaintiff in 1999 “for possible MS[,]” noting
20 plaintiff “had off-and-on symptoms of neurological dysfunction for the last year or two.” (AR
21 126.) Dr. Lellelid goes on to state that, in 1999, plaintiff’s diagnosis was not clear, but that
22 another physician subsequently clarified that plaintiff “likely did have MS[.]” (*Id.*) The record also

01 includes Dr. Lellelid's typed consultation notes from her February 1999 examination of plaintiff,
02 in which she recorded the following:

03 . . . Actually today she says she "feels great" and has felt this way for approximately
04 one month. However, in 1998 she had several episodes of symptoms that would
05 come and go. In February she had right leg numbness, she had problems walking
06 because her leg just did not seem to work like it should, this went away. In March
07 1998 she developed photophobia and some blurred vision. She went to see an eye
08 doctor . . . but [by then] it was gone and her symptoms were better. In the fall of
09 1998 she developed significant fatigue to the point where she had to quit her job in
10 real estate and she has not gone back because of fatigue. She has also had blurred
11 vision, numbness up to her waist and difficulty walking yet again. She has had some
12 concentration problems from time to time and balance difficulties. When she looks
13 back she thinks that she had balance difficulties now for probably several years off and
14 on, and coordination problems in her hands.

10 (AR 282.) Dr. Lellelid suspected MS, but needed to review an MRI scan from the previous month
11 that "was read as neither diagnostic of either vascular disease or MS." (*Id.*) The only other
12 substantive documents in the record prior to plaintiff's DLI include some 2001 notes regarding
13 an incident of rectal bleeding. (AR 129-30.)

14 While it is true that the ALJ noted no significant deterioration between plaintiff's DLI and
15 Dr. Lellelid's opinion of disability, it remains questionable whether there is evidence to support
16 an opinion of disability prior to plaintiff's DLI. In her August 2005 declaration, Dr. Lellelid
17 rendered an opinion in the present tense. (AR 226-30.) It was not until her May 2006 declaration,
18 well after the ALJ's December 2005 decision, that Dr. Lellelid rendered her retrospective opinion.
19 (AR 280-81.) While her explanation for that opinion appears well reasoned (see AR 280-81), the
20 ALJ should consider it on remand.

21 Nor does plaintiff support her contention that the ALJ erred in finding significant the lack
22 of objective evidence to support the alleged degree of severity of plaintiff's condition. Plaintiff

01 hinges this argument on the issue of fatigue. However, Dr. Haynes agreed there was no way to
02 objectively measure fatigue. (AR 296.) When asked what he would expect to see objectively to
03 substantiate this subjective claim, he testified: "It would take a more severe case of Multiple
04 Sclerosis. If it was a progressive case, she might - - and been present for 40 years, you might
05 gradually lose the strength in your legs, you might become clumsy with your arms, lose your
06 balance, end up in a wheelchair. That's a pretty common scenario. It doesn't seem to be the case
07 here." (AR 297.) He further described another doctor's observance of a problem with plaintiff's
08 gait as only a "slight degree of progression." (AR 298.) As a general matter, a treating
09 physician's opinions are entitled to more weight than the opinions of a non-examining physician.
10 However, the Court concludes that the ALJ legitimately cited this issue in critiquing the opinions
11 of Dr. Lellelid. Moreover, while the ALJ did not specifically cite any other reasons for his
12 rejection of the opinions of Dr. Lellelid, he did point to other reasons for rejecting plaintiff's
13 "assertion of disabling fatigue, weakness and balance[.]" including the little treatment she had
14 received since her diagnosis and the fact that she requires only over-the-counter medication for
15 her physician condition. (AR 22.)

16 In sum, the ALJ should further address the opinions of Dr. Lellelid on remand, particularly
17 as to the issue of disability prior to plaintiff's DLI. If necessary, he should contact Dr. Lellelid for
18 further information or additional medical records.

19 Credibility and Lay Witness Testimony

20 Plaintiff asserts that substantial evidence does not support the ALJ's decision to find her
21 statements and those of her lay witnesses not credible. She criticizes the ALJ's heavy reliance on
22 his assessment of objective neurological findings in rendering his credibility decision and argues

01 that his credibility finding should not be ratified.

02 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to
03 reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). *See*
04 *also Thomas*, 278 F.3d at 958-59. In finding a social security claimant's testimony unreliable, an
05 ALJ must render a credibility determination with sufficiently specific findings, supported by
06 substantial evidence. "General findings are insufficient; rather, the ALJ must identify what
07 testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81
08 F.3d at 834. "We require the ALJ to build an accurate and logical bridge from the evidence to her
09 conclusions so that we may afford the claimant meaningful review of the SSA's ultimate findings."
10 *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the
11 ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between
12 his testimony and his conduct, his daily activities, his work record, and testimony from physicians
13 and third parties concerning the nature, severity, and effect of the symptoms of which he
14 complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

15 Lay witness testimony as to a claimant's symptoms or how an impairment affects ability
16 to work is competent evidence. *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The
17 ALJ can reject the testimony of lay witnesses only upon giving reasons germane to each witness.
18 *See Smolen*, 80 F.3d at 1288-89 (finding rejection of testimony of family members because, *inter*
19 *alia*, they were "understandably advocates, and biased") amounted to "wholesale dismissal of the
20 testimony of all the witnesses as a group and therefore [did] not qualify as a reason germane to
21 each individual who testified.") (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)).
22 *Accord Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) ("[L]ay testimony as to a claimant's

01 symptoms is competent evidence that an ALJ must take into account, unless he or she expressly
02 determines to disregard such testimony and gives reasons germane to each witness for doing so.”)
03 Moreover, as recently found by the Ninth Circuit: “[W]here the ALJ’s error lies in a failure to
04 properly discuss competent lay testimony favorable to the claimant, a reviewing court cannot
05 consider the error harmless unless it can confidently conclude that no reasonable ALJ, when fully
06 crediting the testimony, could have reached a different disability determination.” *Stout v.*
07 *Commissioner, Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006).

08 In this case, plaintiff fails to demonstrate error in the ALJ’s credibility decision. First, as
09 required, the ALJ provided germane reasons for rejecting the testimony of plaintiff’s lay witnesses.
10 (AR 22-23.) Second, in finding plaintiff not entirely credible, the ALJ relied not only on a lack of
11 objective evidence to support plaintiff’s assertion as to the severity of her condition, but also on
12 the little treatment she had received, the lack of evidence as to progressive deterioration in her
13 functioning, the fact that the record of her earnings shows she has not worked much since 1996,
14 well before she started experiencing symptoms, and the fact that she requires only over-the-
15 counter medication for her physical condition. (AR 21-22.) As such, the ALJ need only address
16 the credibility issue on remand if necessitated by a reexamination of other issues.

17 RFC

18 The Commissioner asserts the need for a more detailed rationale for the ALJ’s RFC
19 finding. The Commissioner states that, as all of the medical evidence presented to the ALJ is
20 beyond plaintiff’s DLI, it is unclear how the ALJ established plaintiff’s RFC.

21 As discussed above, and as asserted by plaintiff, the record does contain some medical
22 evidence prior to plaintiff’s DLI. (See AR 126-34, 282.) Nor does it seem particularly unclear

01 as to how the ALJ determined plaintiff's RFC. However, because the Court concludes that the
02 ALJ should further delve into the issue of whether evidence exists to support disability prior to
03 plaintiff's DLI, the ALJ's RFC decision may be implicated and require further consideration on
04 remand.

05 Plaintiff also raises an RFC issue. She asserts that, in including merely a "sit/stand option"
06 in the RFC assessment, the ALJ failed to render a sufficiently specific assessment of her need to
07 alternate sitting and standing. *See* SSR 96-9p ("The RFC assessment must be specific as to the
08 frequency of the individual's need to alternate sitting and standing.")

09 It appears that the ALJ intended the sit/stand option to indicate a need to change positions
10 "at will." In giving a hypothetical to the VE, the ALJ said as such: "would need a sit/stand option,
11 meaning she could sit or stand at will in place at the workstation." (AR 334.) Therefore, on
12 remand, the ALJ should clarify his meaning as to a sit/stand option both within his RFC assessment
13 and any hypotheticals to a VE.²

14 Step Five

15 As indicated above, the parties agree the ALJ erred at step five. He erred in identifying
16 semi-skilled jobs, where he had determined plaintiff had no transferable skills. *See* 20 C.F.R. §
17 404.1568(d); SSR 82-41. Further, the fifty local, unskilled call-out operator positions identified
18 is not a significant number. *Cf. Thomas*, 278 F.3d at 960 (1,300 jobs in Oregon and 622,000
19 national jobs deemed significant).

21 ² Because the ALJ clearly erred in relying on the VE's examples of semi-skilled jobs, the
22 Court need not address plaintiff's additional argument as to the fact that one of those jobs was not
compatible with an at-will sit/stand option.

01 Defendant maintains further administrative proceedings are necessary given that it is not
02 clear plaintiff would be unable to perform all unskilled jobs, while plaintiff clarifies that the
03 question at step five is only whether she can perform jobs existing in significant numbers. This
04 matter should be remanded for further administrative proceedings in order to determine whether
05 there are unskilled jobs existing in significant numbers plaintiff could perform. It is not at all clear
06 from the record that the VE could not identify any such jobs. (AR 334-43.) Instead, for reasons
07 that remain unclear, the ALJ relied primarily on semi-skilled jobs identified by the VE. On
08 remand, the ALJ should obtain supplemental vocational expert evidence as to unskilled jobs. This
09 evidence may also be required to the extent the ALJ's RFC assessment is implicated by further
10 review of the opinions of Dr. Lellelid.

11 **CONCLUSION**

12 For the reasons set forth above, this matter should be REMANDED for further
13 administrative proceedings.

14 DATED this 12th day of March, 2007.

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16 Mary Alice Theiler
17 United States Magistrate Judge
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